

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LONDA SCOGGINS,) 1:05-cv-00175-AWI-SMS
)
Plaintiff,) FINDINGS AND RECOMMENDATION TO
) GRANT DEFENDANT'S MOTION TO
v.) DISMISS OR, IN THE ALTERNATIVE,
) FOR SUMMARY JUDGMENT (DOC. 11)
)
JO ANNE B. BARNHART,)
)
Commissioner of Social)
Security,)
)
Defendant.)
)
_____)

Plaintiff is proceeding in forma pauperis with an action seeking judicial review of a final decision of the Commissioner of Social Security (Commissioner) denying Plaintiff's application for benefits. Plaintiff is represented by counsel. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(15). Pending before the Court is Defendant's motion to dismiss the complaint, or, in the alternative, a motion for summary judgment.

I. Background

Plaintiff electronically filed an unverified complaint on February 3, 2005, seeking review pursuant to 42 U.S.C. §§ 405(g)

1 and 1383(c) of the denial of her claim for SSI benefits pursuant
2 to Title XVI of the Social Security Act. Plaintiff alleged that
3 the Appeals Council denied her request for review of the decision
4 of the administrative law judge (ALJ) on November 30, 2004, and
5 at that time the ALJ's decision became the final decision of the
6 Commissioner.

7 In response to service of summons, on June 10, 2005,
8 Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P.
9 12(b)(6) for failure to state a claim, or, in the alternative, a
10 motion for summary judgment, along with a memorandum and attached
11 declaration and exhibits in support of the motion. The docket
12 reveals that the motion and accompanying papers were served
13 electronically on Plaintiff's counsel on June 10, 2005. This
14 notice serves as service of the motion pursuant to Fed. R. Civ.
15 P. 5(b)(2)(D) and Local Rule 5-135(a).

16 Plaintiff did not file a notice of non-opposition or any
17 opposition to the motion.

18 II. Facts

19 The declaration of Joan Devera, chief of court case
20 preparation and review of branch 1 of the office of appellate
21 operations, office of hearings and appeals of the Social Security
22 Administration (SSA), establishes that consistent with 42 U.S.C.
23 § 405(g), pertinent SSA regulations in 20 C.F.R. § 422.210
24 provide that the time for instituting a civil action is within
25 sixty days after the Appeals Council's notice of denial of
26 request for review of the ALJ's decision or notice of the
27 decision by the Appeals Council is received by the individual,
28 except that the time may be extended by the Appeals Council upon

1 a showing of good cause. (Decl. at 2.) Further, as Devera
2 declares, § 422.210(c) (2004) provides:

3 For purposes of this section, the date of receipt
4 of notice of denial of request for review of the
presiding officer's decision or notice of the decision
5 by the Appeals Council shall be presumed to be
5 days after the date of such notice, unless there
6 is a reasonable showing to the contrary.

7 Devera further declares that the official file, which was
8 within her custody and examined under her supervision, showed
9 that after issuance of the ALJ's decision of August 9, 2003,
10 Plaintiff requested review of the decision. On November 26, 2004,
11 the Appeals Council sent notice that it had denied Plaintiff's
12 request for review and notice of the right to commence a civil
13 action within sixty days from the date of receipt. (Decl. at 3,
14 Ex. 2.) The declaration and exhibit further show that the address
15 to which the notice was sent was the same address to which the
16 original notice of unfavorable decision had been sent; further, a
17 copy was sent to Plaintiff's representative, Jeffrey Milam, Esq.
18 (Id.) As of March 9, 2005, Devera was not aware of any request
19 for extension of time to file a civil action. (Decl. at 3.)

20 III. Analysis

21 Defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)
22 (6), Fed. R. Civ. P. 56, and 42 U.S.C. § 405(g) on the ground
23 that the complaint is time barred by § 405(g).

24 A. Motion for Summary Judgment

25 Fed. R. Civ. P. 12(b)(6) provides for a motion to dismiss
26 for failure to state a claim upon which relief can be granted;
27 Rule 12(b) further provides that if on a motion asserting such a
28 defense, matters outside the pleading are presented to and not

1 excluded by the court, the motion shall be treated as one for
2 summary judgment and disposed of as provided in Rule 56, and all
3 parties shall be given a reasonable opportunity to present all
4 material made pertinent to such a motion by Rule 56. A motion to
5 dismiss for failure to state a claim lies pursuant to Rule
6 12(b)(6) where the facts and dates alleged in the complaint
7 indicate that the claim is barred by the statute of limitations.
8 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).
9 If, however, the running of the statute of limitations cannot be
10 determined from the face of the complaint, a motion for summary
11 judgment is the proper procedure. Supermail Cargo, Inc. v. United
12 States, 68 F.3d 1204, 1206 (9th Cir. 1995).

13 Even where a motion is noticed only as a motion to dismiss,
14 the motion may be treated as a motion for summary judgment where
15 under the circumstances of the case, the party against whom
16 summary judgment is entered is represented by counsel and is
17 fairly apprised that the court would look beyond the pleadings
18 and thereby transform the 12(b) motion into one for summary
19 judgment. Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984).
20 All that is required to proceed by way of the summary judgment
21 procedure is to apprise the parties that the Court will look
22 beyond the pleadings to extrinsic evidence and give the parties
23 an opportunity to supplement the record. San Pedro Hotel Co.,
24 Inc. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998).
25 Notice occurs where a party has reason to know that the court
26 will consider matters outside the pleadings. Grove v. Mead School
27 District No. 354, 753 F.2d 1528, 1533 (9th Cir. 1985).

28 Here, the motion itself was entitled "RESPONDENT'S MOTION

1 TO DISMISS APPELLANT'S COMPLAINT, OR IN THE ALTERNATIVE, FOR
2 SUMMARY JUDGMENT." In the body, it was stated that the
3 Commissioner moved for dismissal or summary judgment because the
4 complaint was untimely; it further informed the Plaintiff that
5 the motion was based on the memorandum, affidavit, and exhibits
6 filed with the motion as well as on all records and files in the
7 action. (At. 1.) Thus, adequate notice was given to Plaintiff
8 that a motion for summary judgment was pending.

9 Further, the motion was served on June 10, 2005. Thus,
10 Plaintiff was given not only a reasonable opportunity to present
11 all material made pertinent to such a motion as required by Rule
12 12(b), but also the requisite period of time indicated by Rules
13 56(c) and 6(a) and (e).

14 The Court notes that the material factual question involved
15 in the instant motion, namely, the date of the notice of the
16 Appeals Council's action and of the receipt of the notice, is a
17 matter within the knowledge of the Plaintiff and her
18 representative. It is not a matter that appears to require any
19 discovery in order for the underlying facts to be presented to
20 the Court.

21 B. Summary Judgment

22 Summary judgment is appropriate when it is demonstrated that
23 there exists no genuine issue as to any material fact, and that
24 the moving party is entitled to judgment as a matter of law.
25 Fed. R. Civ. P. 56(c). Under summary judgment practice, the
26 moving party

27 [A]lways bears the initial responsibility of
28 informing the district court of the basis for
its motion, and identifying those portions of

1 "the pleadings, depositions, answers to
2 interrogatories, and admissions on file,
3 together with the affidavits, if any," which
it believes demonstrate the absence of a
genuine issue of material fact.

4 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is the
5 moving party's burden to establish that there exists no genuine
6 issue of material fact and that the moving party is entitled to
7 judgment as a matter of law. British Airways Board v. Boeing Co.,
8 585 F.2d 946, 951 (9th Cir. 1978).

9 Where a party with the ultimate burden of persuasion at
10 trial as to a matter moves for summary judgment, it must
11 demonstrate affirmatively by evidence each essential element of
12 its claim or affirmative defense and must establish that there is
13 no triable issue of fact as to each essential element such that a
14 rational trier of fact could render a judgment in its favor.
15 Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885,
16 888 (9th Cir. 2003). If a party moves for summary judgment with
17 respect to a matter as to which the opposing party has the
18 ultimate burden of persuasion at trial, then the moving party
19 must show that the opposing party cannot meet its burden of proof
20 at trial by establishing that there is no genuine issue of
21 material fact as to an essential element of the opposing party's
22 claim or defense; the moving party must meet the initial burden
23 of producing evidence or showing an absence of evidence as well
24 as the ultimate burden of persuasion. Nissan Fire Ltd. v. Fritz
25 Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). In order to
26 carry its burden of production, the moving party must either
27 produce evidence negating an essential element of the opposing
28 party's claim or defense or show that the nonmoving party does

1 not have enough evidence of an essential element to carry its
2 ultimate burden of persuasion at trial. Id. (citing High Tech
3 Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574
4 (9th Cir. 1990)). In order to carry its ultimate burden of
5 persuasion on the motion, the moving party must persuade the
6 court that there is no genuine issue of material fact. Id.

7 However, "where the nonmoving party will bear the burden of
8 proof at trial on a dispositive issue, a summary judgment motion
9 may properly be made in reliance solely on the pleadings,
10 depositions, answers to interrogatories, and admissions on file."
11 Celotex Corp. v. Catrett, 477 U.S. 317, 323. Indeed, summary
12 judgment should be entered, after adequate time for discovery and
13 upon motion, against a party who fails to make a showing
14 sufficient to establish the existence of an element essential to
15 that party's case, and on which that party will bear the burden
16 of proof at trial. Id. "[A] complete failure of proof concerning
17 an essential element of the nonmoving party's case necessarily
18 renders all other facts immaterial." Id. In such a circumstance,
19 summary judgment should be granted, "so long as whatever is
20 before the district court demonstrates that the standard for
21 entry of summary judgment, as set forth in Rule 56(c), is
22 satisfied." Id. at 323.

23 If the moving party meets its initial responsibility, the
24 burden then shifts to the opposing party to establish that a
25 genuine issue as to any material fact actually does exist.
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
27 586 (1986). In attempting to establish the existence of this
28 factual dispute, the opposing party may not rely upon the denials

1 of its pleadings, but is required to tender evidence of specific
2 facts in the form of affidavits or admissible discovery material
3 in support of its contention that the dispute exists. Rule 56(e);
4 Matsushita, 475 U.S. at 586 n.11.

5 The showings must consist of admissible evidence,
6 Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324,
7 1335 n.9 (9th Cir. 1980), or pleadings, depositions, answers to
8 interrogatories, admissions, and affidavits or declarations, Fed.
9 R. Civ. P. 56(c). Affidavits shall be based on personal
10 knowledge, set forth such facts as would be admissible in
11 evidence, and show affirmatively that the affiant is competent to
12 testify to the matters stated therein. Fed. R. Civ. P. 56(e).
13 Sworn or certified copies of all papers or parts thereof referred
14 to in an affidavit shall be attached thereto or served therewith.
15 Id. Declarations pursuant to 28 U.S.C. § 1746 may be used with
16 the same force and effect as affidavits. Pollock v. Pollock, 154
17 F.3d 601, 611, n.20 (6th Cir. 1998). Unauthenticated documents
18 cannot be considered on a motion for summary judgment. Hal Roach
19 Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1550 (9th
20 Cir. 1990). Legal memoranda and oral argument are not evidence
21 and do not create issues of fact capable of defeating an
22 otherwise valid motion for summary judgment. British Airways Bd.
23 v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978).

24 A party moving for summary judgment is entitled to the
25 benefit of any relevant presumptions that support the motion
26 provided that the facts giving rise to the presumption are
27 undisputed. Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254
28 (9th Cir. 1982).

1 C. Timeliness of the Complaint

2 Defendant argues that the complaint should be dismissed for
3 failure to state a claim because it was filed more than sixty
4 days after mailing of the Commissioner's final decision and thus
5 exceeds the scope of the government's consent to be sued as
6 defined in 42 U.S.C. § 405(g) and (h):

7 (g) Any individual, after any final decision of the
8 Commissioner of Social Security made after a hearing
9 to which he was a party, irrespective of the amount
10 in controversy, may obtain a review of such decision
11 by a civil action commenced within sixty days after the
12 mailing to him of notice of such decision or within
such further time as the Commissioner of Social Security
may allow. Such action shall be brought in the district
court of the United States for the judicial district in
which the plaintiff resides, or has his principal place
of business....

13 (h) The findings and decision of the Commissioner of
14 Social Security after a hearing shall be binding upon
all individuals who were parties to such hearing.
15 No findings of fact or decision of the Commissioner of
16 Social Security shall be reviewed by any person,
tribunal, or governmental agency except as herein
provided. No action against the United States, the
17 Commissioner of Social Security, or any officer or
employee thereof shall be brought under section 1331
18 or 1346 of Title 28 to recover on any claim arising
under this subchapter.

19 These provisions govern Plaintiff's SSI claim. 42 U.S.C. §
20 1383(c)(3).

21 It is established that the sixty-day period defined by §
22 405(g) is not jurisdictional; rather, it is a statute of
23 limitations. Bowen v. City of New York, 476 U.S. 467, 478-79
24 (1986); Banta v. Sullivan, 925 F.2d 343, 345 (9th Cir. 1991).
25 However, it is likewise a condition on the waiver of sovereign
26 immunity and thus has been strictly construed to permit extension
27 only by the Commissioner pursuant to 20 C.F.R. §§ 404.911 and
28 416.1411, or by a court applying traditional principles of

1 equitable tolling in cases where the equities in favor of tolling
2 the limitations period are so great that deference to the
3 agency's judgment is inappropriate. Bowen, 476 U.S. at 479-82
4 (holding equitable tolling appropriate where the agency's
5 secretive conduct prevented the plaintiffs from knowing of a
6 violation of their rights). The sixty-day period serves to
7 compress the time for judicial review and to limit judicial
8 review to the original decision denying benefits, thereby
9 forestalling repetitive or belated litigation of stale
10 eligibility claims. Banta v. Sullivan, 925 F.2d at 345-46.

11 Plaintiff alleges in the complaint that Plaintiff requested
12 review of the ALJ's unfavorable decision of August 9, 2003, by
13 the Appeals Council, which issued a decision denying the
14 requested review on November 30, 2004. Plaintiff alleges that the
15 decision of November 30, 2004, was a final administrative
16 decision. The Court notes that the complaint is not verified and
17 thus does not constitute evidentiary material in support of the
18 assertions in the complaint.

19 The Court's docket¹ shows that the complaint was filed on
20 February 3, 2005.

21 Defendant submitted with the motion a copy of the Appeals
22 Council's decision referred to in the complaint. The decision
23 contains notice to the Plaintiff of not only the sixty-day period
24 after receipt of the letter during which Plaintiff could seek
25

26 ¹The Court may take judicial notice of court records. Fed.
27 R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333
28 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,
635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).

1 judicial review of the decision, but also of the possibility of
2 requesting from the Appeals Council an extension of time to seek
3 judicial review.

4 Plaintiff is presumed to have received notice of the Appeals
5 Council's decision five days after the date of the notice of
6 decision unless there is a reasonable showing to the contrary. 20
7 C.F.R. § 422.210. Thus, Plaintiff is presumed to have received
8 the notice no later than five days after November 26, 2004, or on
9 December 1, 2004. Plaintiff did not file the complaint until
10 February 3, 2005, more than sixty days after the notice.

11 Plaintiff has made no showing that Plaintiff did not receive the
12 decision of the Appeals Council in a timely fashion. Thus, the
13 complaint is barred as untimely under 42 U.S.C. § 405(g) unless
14 the Court tolls the running of the period pursuant to traditional
15 principles of equitable tolling.

16 Plaintiff has neither submitted evidentiary materials in
17 opposition to the motion nor requested an opportunity to do so.
18 Plaintiff has not shown any basis for equitable tolling of the
19 running of the statute of limitations.

20 In summary, the evidence submitted to the Court demonstrates
21 that the complaint was untimely, and thus Plaintiff could not
22 prevail on her claim. Defendant has shown that Defendant is
23 entitled to judgment as a matter of law.

24 IV. Recommendation

25 Accordingly, it IS RECOMMENDED that

- 26 1. Defendant's motion for summary judgment BE GRANTED; and
27 2. The Clerk of Court BE DIRECTED to enter judgment in favor
28 of Defendant Jo Anne B. Barnhart, Commissioner of Social

1 Security, and against Plaintiff, and thereby to close this
2 action.

3 This report and recommendation is submitted to the United
4 States District Court Judge assigned to the case, pursuant to the
5 provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the
6 Local Rules of Practice for the United States District Court,
7 Eastern District of California. Within thirty (30) days after
8 being served with a copy, any party may file written objections
9 with the court and serve a copy on all parties. Such a document
10 should be captioned "Objections to Magistrate Judge's Findings
11 and Recommendations." Replies to the objections shall be served
12 and filed within ten (10) court days (plus three days if served
13 by mail) after service of the objections. The Court will then
14 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
15 (b)(1)(C). The parties are advised that failure to file
16 objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
18 1153 (9th Cir. 1991).

19
20 IT IS SO ORDERED.

21 **Dated: August 22, 2005**
22 icido3

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE